Mohd Jalil bin Abdullah & Anor v Public Prosecutor

HIGH COURT (KOTA BHARU) — CRIMINAL APPLICATION NO 44–34–1996
NIK HASHIM JC
23 JUNE 1996

Criminal Procedure *— Bail — Bailable offence — Repeated failure of accused persons to attend court — Whether magistrate correct in revoking bail and remanding accused persons — Whether bail mandatory in bailable offence — Whether magistrate has discretion not to grant bail if offence is bailable — Criminal Procedure Code (FMS Cap 6) s 387(1)*

Both the accused persons ('the applicants') were charged on 8 November 1987 under s 353 of the Penal Code (FMS Cap 45) ('the Penal Code'). Under the fifth column of Sch 1 to the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the offence was a bailable one and bail was allowed at RM500 each. The case was adjourned several times due to the absence of the applicants either collectively or individually. Bail was increased first to RM1,000 and later to RM3,000 with one surety each. The case was finally fixed for hearing on 21 May 1996 wherein both the applicants were again absent. As a result, warrants for their arrest were issued. On 27 May 1996, the applicants surrendered themselves to court. The learned magistrate refused to accept their explanations and subsequently revoked bail, committed the applicants to custody and set 25 June 1996 as the hearing date. The applicants' application for bail was refused by the learned magistrate. Hence this application to the High Court.

Held, allowing the application:

(1) The term 'shall be released on bail' in s 387(1) of the CPC is mandatory. By virtue of this provision a person accused of a bailable offence is entitled to bail as of right. There is no question of any discretion in granting bail and the court is bound to comply with the provisions under that section (see p 567D–G); *R v Lim Kwang Seng & Ors* [1956] MLJ 178 followed.

(2) The purpose of bail is to secure the attendance of an accused at a certain day and place to answer the charge against him. It is not intended to be punitive and excessive bail ought not to be required (see p 567H); *Zulkifflee bin Hj Hassan v PP* [1987] 2 MLJ 527 followed.

(3) The learned magistrate was correct when he issued the warrant of arrest against the applicants and presented the show-cause notice to the bailor for the absence of the applicants. He was also right when he gave the applicants the opportunity to be heard before he proceeded to cancel the bail (see pp 567I–568A); *Phang Yong Fook v PP* [1988] 1 MLJ 267 followed.

(4) The learned magistrate however was wrong when he ordered the applicants to be remanded. This was illegal and not in compliance with the law. Upon revocation of the previous bail, the magistrate

should have granted a new bail with sufficient sureties as he deemed fit. Only when the applicants failed to execute the new bail was the court empowered to commit them to custody (see p 568B–C).

[Bahasa Malaysia summary

Kedua-dua tertuduh ('pemohon-pemohon') telah dituduh pada 8 November 1987 di bawah s 353 Kanun Keseksaan (NMB Bab 45). Di bawah ruang kelima, Jadual 1 kepada Kanun Acara Jenayah (NMB Bab 6) ('KAJ') kesalahan tersebut adalah kesalahan boleh jamin dan ikat jamin dibenarkan sebanyak RM500 setiap orang. Kes itu telah ditangguhkan beberapa kali disebabkan ketidakhadiran pemohon-pemohon sama ada secara bersama ataupun secara individu. Ikat jamin dinaikkan pada mulanya kepada RM1,000 dan kemudiannya kepada RM3,000 dengan seorang penjamin setiap orang. Kes itu akhirnya ditetapkan untuk perbicaraan pada 21 Mei 1996 di mana pemohon-pemohon sekali lagi telah tidak hadir. Kesudahannya, waran tangkap telah dikeluarkan terhadap mereka. Pada 27 Mei 1996 pemohon-pemohon telah menyerah diri kepada mahkamah. Majistret yang bijaksana enggan menerima penjelasan pemohon-pemohon dan seterusnya telah membatalkan ikat jamin, menahan pemohon-pemohon dan menetapkan 25 Jun 1996 sebagai tarikh perbicaraan. Majistret yang bijaksana telah menolak permohonan ikat jamin. Maka, permohonan ini dibuat kepada Mahkamah Tinggi.

Diputuskan, membenarkan permohonan ini:

(1) Ungkapan 'shall be released on bail' di bawah s 387(1) KAJ adalah mandatori. Di bawah peruntukan ini, seorang yang dituduh melakukan suatu kesalahan yang boleh jamin adalah berhak untuk diikat jamin. Tidak timbul persoalan mengenai budi bicara dalam memberikan ikat jamin dan mahkamah mestilah mematuhi peruntukan di bawah seksyen tersebut (lihat ms 567D–G); *R v Lim Kwang Seng & Ors* [1956] MLJ 178 diikut.

(2) Tujuan ikat jamin adalah untuk memastikan kehadiran tertuduh pada hari dan masa yang ditetapkan untuk menjawab tuduhan terhadapnya. Ianya bukanlah bertujuan sebagai hukuman dan ikat jamin yang keterlaluan seharusnya tidak diperlukan (lihat ms 567H); *Zulkifflee bin Hj Hassan v PP* [1987] 2 MLJ 527 diikut.

(3) Majistret yang bijaksana adalah betul ketika beliau mengisukan waran tangkap terhadap pemohon-pemohon serta mengemukakan notis untuk menjawab kepada penjamin-penjamin untuk ketidakhadiran pemohon-pemohon. Beliau juga adalah betul ketika memberikan pemohon-pemohon peluang untuk didengar sebelum ikat jamin dibatalkan (lihat ms 567I–568A); *Phang Yong Fook v PP* [1988] 1 MLJ 267 diikut.

(4) Walau bagaimanapun majistret yang bijaksana adalah salah ketika beliau memerintahkan supaya pemohon-pemohon ditahan. Ini adalah tidak sah dan tidak mematuhi undang-undang. Selepas

membatalkan ikat jamin yang lama, majistret yang bijaksana sepatutnya memerintahkan ikat jamin yang baru dengan jaminan secukupnya seperti yang difikirkan wajar. Hanya jikalau pemohon-pemohon gagal melaksanakan ikat jamin tersebut barulah mahkamah mempunyai kuasa untuk menahan pemohon-pemohon (lihat ms 568B–C).]

Notes

For a case on bailable offences, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 584.

Cases referred to

Phang Yong Fook v PP [1988] 1 MLJ 267
R v Lim Kwang Seng & Ors [1956] 22 MLJ 178
Zulkifflee bin Hj Hassan v PP [1987] 2 MLJ 527

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 387(1), 389, Sch 1
Penal Code (FMS Cap 45) s 353

Latifah Ariffin (*Latifah Ariffin & Co*) for the applicants.
Mohd Amin Firdaus bin Abdullah (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Nik Hashim JC: This is an application for bail. Both the applicants were charged for an offence of using criminal force to deter a public servant from discharging his duty under s 353 of the Penal Code (FMS Cap 45) ('the Penal Code') which both the applicants were alleged to have committed on 27 October 1987. The section provides that on conviction an offender shall be punished with imprisonment for a term which may extend to two years or with a fine or with both. Under the fifth column of the Sch 1 to the Criminal Procedure Code (FMS Cap 6) ('the CPC'), the offence is a bailable offence.

The applicants were first charged on 8 November 1987 before the magistrate, Tanah Merah, and bail was allowed at RM500 each and hearing was fixed on 2 March 1988. Since then the case was adjourned several times on the grounds mainly that either the first or the second applicant or both of them were absent. Warrants of arrest were issued against them. The bail was increased twice from the original RM500 to RM1,000 and subsequently to RM3,000 with one surety, and the case was finally fixed for hearing on 21 May 1996.

On the date in question, both the applicants were again absent, so were their bailors. As a result, warrants for their arrest were issued. On 27 May 1996, they surrended themselves to court. The first applicant explained that he was ill and fell asleep on taking some medicine, and produced a medical certificate in support. The second applicant mistook the date.

After viewing the history of the case, the learned magistrate was not satisfied with their explanations and as a result, he revoked the bail and committed both the applicants to custody and set 25 June 1996 as the date for the hearing of the case. Meanwhile, they filed an application for bail but it was turned down by the learned magistrate. Hence this application before the High Court on 23 June 1996.

The main issue before the court is whether the learned magistrate was right to have revoked the bail, remanded the applicants and refused bail.

With regard to when a person may be released on bail, s 387(1) of the CPC provides:

> When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time, while in the custody of such officer or at any stage of the proceedings before such court, to give bail, such person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of corporal or by such court.

In other words, under the provisions stated, a person accused of a bailable offence, is entitled to bail as of right. There is no question of any discretion in granting bail. The provisions are imperative and the court is bound to comply with the provisions under the section. The term 'shall be released on bail' under s 387(1) is mandatory (see *R v Lim Kwang Seng & Ors* [1956] MLJ 178). Bashir A Mallal in *Mallal's Criminal Procedure* (4th Ed) observed at p 549:

> It must be noted that a person accused of a bailable offence who is detained or arrested without warrant is entitled to bail, as a matter of right and not as a favour. The court or a police officer is bound to comply with this section. A magistrate is not competent to refuse bail unless the law sanctions such refusal.
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> In bailable offences there is no question of any discretion in granting bail. The provisions of this section are imperative
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> In English common law, refusal or delay by any judge or magistrate to bail any person bailable is an offence against the liberty of the subject: 4 B1 Com 297.
>
> However bad a character an accused may possess he is undoubtedly entitled to be proceeded against according to law and not to be deprived of his liberty except in due course of law. Hence where an accused is rightly entitled to be on bail his bail cannot be cancelled except in due course of the law: *Bashiruddin v R* AIR 1932 All 327.

The purpose of bail is to secure the attendance of an accused person at a certain day and place to answer the charge against him. It is not intended to be punitive and excessive bail ought not to be required: *Zulkifflee bin Hj Hassan v PP* [1987] 2 MLJ 527; see also s 389 of the CPC.

The court could well understand the frustration of the learned magistrate in dealing with these applicants. The record shows that they have abused the bail as an excuse not to attend court. The learned

magistrate was right in issuing warrants of arrest against the applicants, and a show-cause notice to the bailor for their absence. He was also right when he gave the applicants an opportunity to be heard before he proceeded to revoke the bail: *Phang Yong Fook v PP* [1988] 1 MLJ 267. But he was wrong when he ordered them to be remanded. This practice is illegal and not in compliance with the law: *Hamid's Criminal Procedure* at p 861.

In this case the applicants had surrendered themselves to court pursuant to the warrants of arrest. What the learned magistrate should have done was, upon revocation of the bail, he should have granted a new bail with sufficient sureties as he deemed fit. Only if they fail to execute it, then the court is empowered to commit them to custody. However bad the record of the applicants may be, they are still entitled to bail as a matter of right, and for the reasons above-stated the learned magistrate cannot refuse bail and commit them to custody. In the event, I set aside the order of the learned magistrate and allow the application and release them on cash bail of RM5,000 each, with one surety for each applicant, and further order that the applicants and their sureties be present at the Magistrate's Court Tanah Merah, Kelantan at 8.30am on 25 June 1996 for the hearing of the case.

Application allowed.

Reported by Lew Chee Seong